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Order 99-4-13

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Served: April 14, 1999

Issued by the Department of Transportation
on the 13th day of April, 1999

LOVE FIELD SERVICE
INTERPRETATION PROCEEDING

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Docket OST-98-4363

ORDER ON RECONSIDERATION

The Department held this proceeding to state its interpretation of several federal statutes as they apply to an on-going dispute over additional airline service at Dallas' Love Field. The Department issued final orders interpreting those statutes, Order 98-12-27 (December 22, 1998), and ruling on various procedural issues, Order 98-12-28 (December 22, 1998). On the statutory questions, the Department primarily held that the City of Dallas as Love Field's owner could not bar airlines from operating services authorized by Congress. Our interpretation was consistent with the position taken by Dallas, Southwest Airlines, Continental Express, and Legend Airlines, but contrary to the position taken by the City of Fort Worth, the Dallas-Fort Worth International Airport Board ("the DFW Board"), and American Airlines.

Fort Worth and the DFW Board are seeking reconsideration of several of the findings and conclusions made by our final orders. Dallas, Continental Express, and Legend oppose reconsideration.

After considering the parties' pleadings, we have determined to grant reconsideration and to reaffirm our interpretations and findings. Fort Worth

and the DFW Board have failed to show that our conclusions and analysis contain any errors. This order addresses their requests for reconsideration of the statutory interpretations set forth in Order 98-12-27; a companion order addresses their requests for reconsideration of procedural rulings made by Order 98-12-28.

BACKGROUND

The History of Restrictions on Love Field Service

Our earlier order set forth in detail the factual background to the current dispute over additional Love Field service.¹ In brief, for many years Love Field was Dallas' airport during a period when Fort Worth had its own airport. In 1968 the two cities agreed to build a new airport, the Dallas-Fort Worth International Airport ("DFW"), which would be the area's primary airport. As part of that agreement, the cities enacted a bond ordinance ("the Bond Ordinance"), which required each city, to the extent legally permissible, to phase out interstate airline service at its local airport and to shift that service to DFW. Order 98-12-27 at 3-6.

After DFW opened, a controversy over Southwest Airlines' use of Love Field for interstate service caused Congress to enact Section 29 of the International Air Transportation Competition Act of 1979, 94 Stat. 35, 48-49 (1980), commonly called the Wright Amendment. The Wright Amendment (i) allowed airlines to operate scheduled passenger flights from Love Field to points in Texas and the four states bordering on Texas and (ii) prohibited scheduled passenger flights, interline service, and through service from Love Field to points outside those five states (we refer to the area within which unrestricted service is permitted as "the Love Field service area"). The Wright Amendment, however, allowed unrestricted passenger operations with aircraft having a passenger capacity of no more than 56 passengers (this provision is "the commuter aircraft exemption"). The Wright Amendment's authorization of certain types of interstate service at Love Field overrode the Bond Ordinance's apparent prohibition against the operation of any interstate service. Order 98-12-27 at 7-10.

In 1997 Congress amended the Wright Amendment to authorize additional interstate service at Love Field. Section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998, P.L. No. 105-66, 111 Stat. 1425, 1447 (October 27, 1997), commonly called the Shelby Amendment. The Shelby Amendment expanded the Love Field service area by adding Kansas, Mississippi, and Alabama to the five-state area created by the Wright Amendment. The Shelby Amendment also clarified the meaning of the commuter aircraft exemption. Order 98-12-27 at 12-13. That clarification

¹ Order 98-12-27 also set forth the text of the Wright Amendment at 3, the Shelby Amendment at 12-13, and the preemption provision, 49 U.S.C. 41713, at 27.

resolved a dispute between Legend's affiliate, Dalfort Corporation, and the Department, which had ruled that the commuter aircraft exemption did not allow longhaul flights operated with large aircraft reconfigured to hold no more than 56 passengers. Order 98-12-27 at 11-12.

Immediately after the Shelby Amendment's enactment, Fort Worth filed a declaratory judgment suit against Dallas in state court. Fort Worth sought a ruling that Dallas could not allow airlines to operate the new services authorized by that statute. City of Fort Worth, Texas v. City of Dallas, Texas, et al., Tarrant County District Ct. No. 48-171109-97. The suit was removed to federal court but later remanded to the state court, where it has remained. Dallas filed its own suit in federal court against the Department and Fort Worth. Dallas sought a ruling that federal law did not allow it to block services authorized by the Shelby Amendment. City of Dallas, Texas v. Department of Transportation et al., N.D. Tex. No. 3-97CV-2734-T (filed November 6, 1997). See Order 98-12-27 at 14-15. Other parties also joined the federal and state court litigation.

In the state and federal court cases, as in this proceeding, Fort Worth, the DFW Board, and American have contended that the Bond Ordinance required Dallas to bar the operation of the additional services authorized by the Shelby Amendment and that the relevant federal statutes would allow Dallas to impose such restrictions on airline service. Dallas, Southwest, Continental Express, and Legend have argued the contrary.

The state court issued a decision that, in contrast to ours, held that Dallas was entitled under federal law to block airlines from operating the services authorized by the Shelby Amendment and that the commuter aircraft exemption authorized no flights between Love Field and points outside the Love Field service area. See DFW Petition, Exhibit A. After we issued our final decisions in this proceeding, Dallas, Continental Express, and Legend asked the state court to dismiss the suit filed by Fort Worth, to modify the judgment, or to hold a new trial. See Dallas Opposition at 11.

The federal court has not held any hearing on the issues. Our issuance of the final orders in this proceeding and, as discussed below, the filing of petitions for judicial review of those orders caused the district court to stay all proceedings in the federal case. Continental Airlines and Continental Express v. City of Dallas and City of Fort Worth, N.D. Tex. No. 398CV1187-R (Order of January 12, 1999).

Our Institution of This Proceeding

The requests by several parties in the dispute for our assistance and the importance of the federal law questions presented by the dispute caused us to begin this proceeding. Order 98-8-29 (August 25, 1998). We stated that we would issue rulings on five federal law issues: (i) Dallas' ability as Love Field's owner to restrict airlines from operating Love Field services, (ii) the preemptive effect of the Wright and Shelby Amendments on Dallas' ability otherwise to restrict Love Field service, (iii) the interpretation of the commuter aircraft exemption, (iv) the enforceability of the DFW Board's airline use agreement clauses restricting airlines from using other airports in the area, and (v) Continental Express' ability to offer through service over Houston when its Love Field-Houston flights used aircraft having a passenger capacity of no more than 56 passengers. Order 98-8-29 at 4; Order 98-9-5 (September 3, 1998) at 3.

As we pointed out, we held a similar proceeding in 1985 in order to resolve other disputes over the interpretation of the Wright Amendment. Order 98-8-29 at 1, 3, citing Love Field Amendment Proceeding, Order 85-12-81 (December 31, 1985). The Court of Appeals upheld that determination. Continental Air Lines v. DOT, 843 F.2d 1444 (D.C. Cir. 1988).

The Department's Final Decision

After considering all of the parties' submissions, we concluded that we had the authority and responsibility to issue rulings on the relevant federal law issues. Order 98-12-27 (December 22, 1997). We found that the restrictions on Love Field service sought by Fort Worth, American, and the DFW Board are contrary to federal law, as explained below. A separate order granted Legend's application for certificate authority, subject to Legend's obtaining the needed authority from the Federal Aviation Administration ("FAA"), Order 98-12-29 (December 22, 1998).

As we noted, our decision was consistent with a preliminary FAA decision in an administrative proceeding against a Colorado airport. The FAA decision stated that the airport could not prohibit scheduled service operated with small aircraft while allowing non-scheduled commercial services with similar aircraft. Order 98-12-27 at 3, 17, 31, citing Centennial Express Airlines et al. v. Arapahoe County Public Airport Authority, FAA Docket Nos. 16-98-05 et al., Director's Determination (August 21, 1998).²

² An FAA hearing officer issued a decision on December 23, 1998, affirming the Director's Determination's findings and conclusions ("the Hearing Officer decision"). The Associate Administrator for Airports affirmed the Hearing Officer Decision on February 18, 1999 ("the

We recognized that our decision was contrary to the state court's conclusions. However, the state court's failure to issue an opinion explaining its conclusions kept us from taking into consideration that court's reasoning. Order 98-12-27 at 22. The Department was never a party to the state court proceeding and so is not bound by the court's conclusions. Order 98-12-28 at 8.

Before addressing the federal statutory questions, we stated that our decision interpreting the federal statutes governing Love Field and preemption would not affect safety: the FAA would maintain the safety of aircraft operations in the Dallas-Fort Worth area and would not permit air traffic safety to be compromised under any circumstances. Order 98-12-27 at 22-23. We additionally concluded that no environmental impact statement was required for the issuance of our decision, since we were only interpreting statutory requirements imposed by Congress. Order 98-12-27 at 23-24.

The principal statutory issue in our proceeding (and the principal issue addressed in the petitions for reconsideration) was whether federal law would allow Dallas to block airlines from operating the Love Field services authorized by the Shelby Amendment. The applicable statutory provision, 49 U.S.C. 41713(b), preempts state and local government regulation of airline routes, prices, and services. This section, however, allows state and local governments to exercise their proprietary powers as airport owners. 49 U.S.C. 41713(b)(3).³ We held that Dallas' proprietary rights as Love Field's owner would not allow the city to restrict service at that airport as demanded by Fort Worth. Order 98-12-27 at 26-42.

We emphasized the limited nature of our decision on the scope of Dallas' proprietary powers. We were determining only whether an airport had the power to restrict airline services in a way which was essentially the same as route regulation. Order 98-12-27 at 25. A key factor in our decision was the lack of any showing that there is a legitimate need for stopping airlines from operating the Love Field services authorized by the Shelby Amendment. *Id.* at 33-40. We did not hold that Dallas had no authority to limit the level of operations at Love Field. While Dallas may not regulate airline routes, as sought

Final FAA Decision"). The airport proprietor has filed a petition for judicial review. Arapahoe County Public Airport Authority v. FAA et al., 10th Cir. No. 99-9508 (filed March 10, 1999).

³ In this proceeding we did not consider whether the airport grant statute, 49 U.S.C. 47107, also limited Dallas' ability to restrict Love Field service. See Order 98-12-27 at 24, n. 7.

by Fort Worth, it and other airport operators may regulate most aspects of airport operations. Order 98-12-27 at 24-25.

We pointed out that the judicial and agency decisions in proprietary rights cases have allowed an airport proprietor to impose reasonable and non-discriminatory restrictions on the use of an airport when those restrictions are demonstrably necessary to achieve a rational and legitimate goal. See, e.g., Western Air Lines v. Port Authority of New York & New Jersey, 658 F. Supp. 952 (S.D.N.Y. 1986), aff'd, 817 F.2d 222 (2d Cir. 1987), cert. denied, 485 U.S. 1006; National Helicopter Corp. v. City of New York, 137 F.3d 81, 89 (2nd Cir. 1998). See also 14 C.F.R. 399.110(f). No court has held or suggested that one airport may adopt a perimeter rule to protect a different airport from competition. Two court decisions had upheld airport perimeter rules adopted to allocate services between airports owned by one proprietor, Western Air Lines and City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982). Both decisions did so on the basis of proof that the rules were necessary to alleviate substantial congestion problems at the airport covered by the restrictions and, in one case, necessary for the viability of a second airport. Order 98-12-27 at 28-32, 30, 34, 41.⁴

We then concluded that the restrictions sought by Fort Worth did not meet the standard for a valid airport restriction on airline services. Those restrictions were equivalent to route regulation. Fort Worth wished to deny airlines the ability to choose which Dallas-Fort Worth routes would be served from Love Field. Order 98-12-27 at 34-35.

While restrictions on Love Field service arguably could be within Dallas' proprietary rights if necessary to protect the viability of DFW (if Dallas were the proprietor of both Love Field and DFW), no party had cited evidence showing that the additional services authorized by the Shelby Amendment would threaten the viability of DFW or DFW's role as the Dallas-Fort Worth area's dominant airport. Order 98-12-27 at 37-38.

On the second federal law question considered by us, whether the Wright and Shelby Amendments preempted Dallas' ability as Love Field's owner to restrict service, we concluded that the two statutes did preempt whatever proprietary

⁴ City of Houston, however, concerned an FAA rule, not a restriction imposed by an airport operated by a state or local government. Order 98-12-27 at 29. As a result, it may not provide useful guidance for determining the limits of the proprietary rights of state and local governments that own airports. Id. at 30, n. 11.

rights Dallas might otherwise have. The two statutes affirmatively authorized airlines to operate certain types of service at that airport. Order 98-12-27 at 42-47.

On the third issue, we concluded that the Shelby Amendment authorized any airline to use jet aircraft with a passenger capacity of no more than 56 passengers to operate flights from Love Field to any city in the United States. Neither the Wright Amendment nor the Shelby Amendment placed any limits (other than the passenger capacity limit and a weight limit) on the type of aircraft that could be used under the commuter aircraft exemption. Similarly, neither statute placed any geographical limit on the type of markets that could be served under that exemption, in contrast to the express geographical limits placed on services operated with larger aircraft. Order 98-12-27 at 47-50.

On the fourth issue, we concluded that the DFW Board could not enforce its use agreements with airlines insofar as those agreements purportedly barred airlines from operating interstate flights from any other airport in the Dallas-Fort Worth area without the DFW Board's permission. We reasoned that the use agreements' restrictions on the use of competing airports were equivalent to route regulation by a local government and therefore barred by the statutory preemption provision. Order 98-12-27 at 50-55.

The fifth issue arose because Continental Express was offering through service from Love Field to points outside Texas and the states bordering on Texas on its commuter aircraft flights from Love Field to Houston, the hub of its parent corporation, Continental Airlines. We held that such service was permissible. Order 98-12-27 at 55-58.

Judicial Review Proceeding

Fort Worth, the DFW Board, American, the Love Field Citizens Action Committee, Dallas, and Southwest have filed petitions for review of our decision. City of Fort Worth, Texas et al. v. Department of Transportation, 5th Cir. No. 98-60812 (filed December 31, 1998).

The filing of the DFW Board and Fort Worth petitions for reconsideration caused the Department to file a motion to dismiss the DFW Board and Fort Worth petitions for judicial review and to defer further proceedings on the other petitions until it issued a decision on reconsideration. The delay in the Fifth Circuit case will be unfortunate, since any continuing uncertainty over the validity of our decision could delay the beginning of additional service at Love

Field. That will hurt the public and interfere with Congress' expectation that the Shelby Amendment would lead to new services at Love Field. We nonetheless filed the motion because the courts have held that a party's petition for judicial review must be dismissed if the party seeks reconsideration of the agency order and because briefing and arguing the remaining petitions for judicial review would be inefficient when we could either modify our decision or further explain why it is correct.⁵

THE PARTIES' PLEADINGS ON RECONSIDERATION

The DFW Board and Fort Worth seek reconsideration of our conclusions on four of the issues. They argue that we are bound by the state court's judgment and may not issue an order stating an interpretation of the federal statutes contrary to that court's decision. On that basis they contend that we must reverse our decisions on the first, second, and third federal statutory questions. That is the only ground on which they seek reconsideration of our decisions on the second and third questions, that is, our conclusions that the Wright and Shelby Amendments preempt Dallas' ability to restrict Love Field service and that the Wright and Shelby Amendments allow airlines to provide longhaul service from Love Field with jet aircraft that meet the 56-passenger capacity limitation. DFW Petition at 1. We see no need to discuss the second and third issues further in this order. As explained in our companion order, we are not bound by the state court's decision.

Fort Worth and the DFW Board additionally charge that we issued our decision on the scope of Dallas' proprietary rights without giving the parties fair notice of our intent to rely on findings of fact. The parties allegedly had no notice that they should submit factual evidence. DFW Petition at 7-8; Fort Worth 98-12-27 Petition at 2-4. The DFW Board also argues that Dallas' proprietary rights allow it to restrict Love Field service for two reasons: to implement the cities' Bond Ordinance and to protect DFW from the significant loss of revenues and service that would result if airlines operated additional flights at Love Field.

The DFW Board briefly challenges our conclusion that it may not block airlines that signed a DFW use agreement from using another Dallas-Fort Worth area airport for interstate service. DFW Petition at 9-10.

⁵ In *West Penn Power Co. v. U.S. EPA*, 860 F.2d 581, 582 (3d Cir. 1988), the Court dismissed the case after it had been briefed and argued when the Court learned that the petitioner had filed a petition for agency reconsideration.

Dallas, Continental Express, and Legend have filed answers opposing reconsideration. Dallas and Continental Express contend that we are not required to give full faith and credit to the state court decision. Dallas additionally argues that we need not and should not resolve the factual issues raised by the DFW Board; we should instead state the standard to be used for determining when an airport proprietor may restrict service at an airport to benefit a second airport. Continental Express and Legend assert that the DFW Board and Fort Worth had the opportunity to submit factual evidence and chose not to exercise it. Legend filed a second reply where it argues that the reconsideration petitions have raised nothing warranting reconsideration, that the proceeding should be completed promptly, and that American, Fort Worth, and the DFW Board seek only to block additional airline competition.

No other party sought reconsideration or responded to the petitions filed by Fort Worth and the DFW Board.

After considering the pleadings, we find no error in our decision and therefore reaffirm our conclusions in Order 98-12-27.⁶

ISSUE ONE: THE SCOPE OF DALLAS' PROPRIETARY RIGHTS

The Fairness of Our Procedures

We gave the parties ample opportunity to present their factual and legal arguments to us. We allowed the parties to file comments and reply comments, and we extended the filing deadlines. We also accepted numerous pleadings filed after the deadlines. Order 98-12-27 at 59. Our first order stated what the issues would be, and the parties' ability to file reply comments allowed them to respond to the points made by opposing parties. Nonetheless, the DFW Board and Fort Worth now contend that we issued our decision on the proprietary rights issue without giving the parties notice that they should submit evidence in support of their statutory arguments. They allege that the lack of notice kept them from filing evidence showing that the restrictions on Love Field service demanded by them were necessary to carry out legitimate goals and were thus within an airport owner's proprietary rights.

⁶ Continental Express suggests that we could not modify our conclusions without the approval of the Fifth Circuit. Continental Express Answer at 1, n. 2. We disagree, in large part because we have asked the Court to defer further proceedings until we rule on the reconsideration petitions filed by Fort Worth and the DFW Board. See American Farm Lines v. Black Ball Freight Service, 397 U.S. 532, 540-542 (1970); B.J. Alan Co. v. ICC, 897 F.2d 561, 562, n. 1 (D.C. Cir. 1990).

Fort Worth claims that it would submit such evidence if we hold a formal hearing. Fort Worth 98-12-27 Petition at 4.

The DFW Board had submitted hundreds of pages from a transcript of the state court proceeding but never specifically relied on any part of that material in presenting its arguments. As explained in our final order, we had no obligation to consider the material since the DFW Board's pleadings cited none of it. Order 98-12-27 at 19, n. 4. The DFW Board's reconsideration petition asserts that the DFW Board would have cited the relevant portions of that transcript had it known that we would rely on factual findings in our decision. DFW Board Petition at 8.

We think there is no merit to these procedural complaints. We concluded as a matter of statutory interpretation that an airport proprietor may not limit service at one airport in order to protect the revenues of a second airport, except arguably when necessary to protect the second airport's viability when the proprietor owns both airports. At most the procedural complaints by the DFW Board and Fort Worth would put in question our application of that legal standard to the factual circumstances of Love Field, for our conclusion on the statutory interpretation issue is not based on our review of the evidence. Furthermore, neither the DFW Board nor Fort Worth claims that it has evidence indicating that the Love Field services authorized by the Shelby Amendment would threaten DFW's viability. As discussed below, the DFW Board contends only that its evidence shows that restrictions on Love Field service are needed to ensure that DFW will continue to have as many flights as it has today. Whether that evidence is persuasive or not, it is irrelevant under our legal standard. Fort Worth has not claimed that it has any evidence indicating that the services authorized by the Shelby Amendment would put DFW's viability at risk.

Furthermore, the charges that the DFW Board and Fort Worth allegedly had no notice that we would consider factual evidence have no merit. As we explained in our final decision in response to a similar argument by American, Order 98-12-27 at 37, n. 16, the parties knew that we would be addressing the proprietary rights issue in terms of the Love Field dispute. We had stated that we intended to consider the federal law issues in an effort to help resolve the Love Field dispute. Order 98-8-29 at 4-5. This put parties on notice that the factual circumstances underlying the dispute were relevant.

Dallas, Continental Express, and Legend thus did submit factual evidence supporting their position that there was no legitimate basis on which Dallas

could block airlines from operating the additional services authorized by the Shelby Amendment. Order 98-12-27 at 37-38. As we stated, notwithstanding the evidentiary submissions and arguments made by Dallas, Continental Express, and Legend, “none of the parties seeking restrictions on Love Field service made any effort to show that current conditions require a prohibition against the operation of the services authorized by the Shelby Amendment.” *Id.* at 38. Those parties filed no such evidence even though other parties had pointed out that courts had affirmed airport perimeter rules only on the basis of factual proof that the rules were necessary. *See, e.g.*, Dallas Comments at 23-26; Legend Comments at 89-90.

Against this background, we find that the complaints by the DFW Board and Fort Worth about the alleged lack of notice have no merit. First, Fort Worth does not even say what evidence it would submit or what facts it would attempt to prove. *See* Fort Worth 98-12-27 Petition at 4. We see no reason why we should give Fort Worth an additional opportunity to submit evidence when it has completely failed to tell us what it would submit and why we must consider it. It is well-established that a party complaining about allegedly unfair agency procedures must show how it has been prejudiced. *See, e.g., Air Canada v. DOT*, 148 F.3d 1142, 1156-1157 (D.C. Cir. 1998); *Northwest Airlines v. DOT*, 15 F.3d 1112, 1122 (D.C. Cir. 1994). Fort Worth has made no such showing.

Equally unpersuasive is the DFW Board’s claim that it failed to cite specific portions of the evidence submitted by it only because it allegedly did not know that we would engage in a factual analysis in deciding the proprietary rights issue. Presumably the DFW Board submitted that material because it thought that the evidence would be relevant to our decision. If the DFW Board believed that we would not be considering any factual issues, as it now claims, it would not likely have incurred the expense of filing the hundreds of pages that it did file. If the DFW Board wanted us to rely on evidence contained in the transcripts, it was obligated to cite the statements. Order 98-12-27 at 19, n. 4. It has not excused its failure to do so. We have nonetheless reviewed the material belatedly cited by the DFW Board, as discussed below, and find that it does not show any error in our earlier findings.

Furthermore, federal law clearly allows an airport proprietor to restrict airline service only if the restrictions are reasonable. The DFW Board itself quotes the court’s statement in *British Airways Board v. Port Authority of New York & New Jersey*, 558 F.2d 75 (2nd Cir. 1977), that any restrictions must be “reasonable” and “advance the local interest.” DFW Petition at 8. *See also Western Air Lines, supra*, 658 F. Supp. at 958; *National Helicopter Corp. v. City*

of New York, 137 F.3d 81, 89 (2nd Cir. 1998); 14 C.F.R. 399.110(f). Showing that a restriction is reasonable necessarily requires demonstrating on factual grounds that it is necessary and appropriate for achieving a legitimate airport goal. The leading judicial decisions on airport restrictions, Western Air Lines and City of Houston, upheld the restrictions only because the airport proprietor in each case had submitted factual evidence showing that the restrictions were necessary. See Order 98-12-27 at 28-30, 34. Thus past court and agency cases gave Fort Worth and the DFW Board notice that they needed to show that the Love Field restrictions sought by them were actually required. The FAA similarly concluded in the Centennial Airport case that the airport proprietor was obligated to demonstrate that any restrictions on airline service were necessary. FAA Final Decision at 27.

Fort Worth's other complaints about the alleged unfairness of our procedures, Fort Worth 98-12-27 Petition at 2, are equally without merit. Fort Worth baselessly charges that we were not interested in hearing evidence or giving the parties a fair opportunity to present their case. It grounds that charge on, among other things, our original decision to give parties two weeks to file comments. As Fort Worth well knows, we later doubled the comment period by Order 98-9-5. We also accepted all of the parties' supplemental pleadings, including eight filed by Fort Worth. Fort Worth wrongly suggests that our refusal to conduct airspace safety and environmental investigations reflected our decision to decide the issues quickly without adequate information. We instead refused to conduct such investigations because they were not legally required. Order 98-12-27 at 22-24. Fort Worth has not challenged that determination on reconsideration, and Fort Worth itself has never requested such investigations.

Fort Worth wrongly alleges that we did not comply with the Administrative Procedure Act. Fort Worth 98-12-27 Petition at 4. As authorized by the Administrative Procedure Act, we issued a declaratory order. Order 98-12-28 at 6, citing 5 U.S.C. 554(e); British Caledonian Airways v. CAB, 584 F.2d 982 (D.C. Cir. 1978). This proceeding is an adjudicatory proceeding addressing a dispute over airline restrictions at one airport, not a rulemaking. We followed the same approach in 1985, which we issued another declaratory order interpreting the Wright Amendment, Love Field Amendment Proceeding, Order 85-12-81, an order affirmed by the Court of Appeals. Continental Air Lines, 843 F.2d 1444. Fort Worth additionally errs in complaining that we failed to give parties adequate notice of what issues we would address. Fort Worth 98-12-27 Petition at 4. The contrary was the case.

Dallas' Ability as Proprietor to Restrict Service to Implement the 1968 Agreement

Aside from its procedural complaints, the DFW Board challenges on two substantive grounds our decision that Dallas' proprietary rights would not allow Dallas to bar Love Field services authorized by the Shelby Amendment. The DFW Board claims that Dallas' proprietary rights allow it to restrict Love Field service when doing so is necessary to carry out the cities' original agreement to phase out interstate service at Love Field and Fort Worth's local airports, DFW Petition at 8-9, and, as discussed in the next section, that restrictions on Love Field service are needed to protect DFW's business.

Our final decision explained that the 1968 Bond Ordinance could not justify restrictions on Love Field service today. Among other things, we noted that the Bond Ordinance by its terms did not flatly prohibit all interstate service at Love Field, since it only required the closing out of interstate service at Love Field to the extent legally permissible. Order 98-12-27 at 6, 39. More importantly, any Bond Ordinance prohibition against interstate service at Love Field would be within Dallas' proprietary powers only if necessary to maintain DFW's viability (if Dallas were deemed to own both airports). No one has shown that a prohibition against the services authorized by the Shelby Amendment is needed to maintain DFW's existence or even its role as the area's principal airport. Order 98-12-27 at 37-38. In addition, as we pointed out, Congress may both transform the economic regulatory structure for the airline industry and define what operations may be permitted at an airport. Congress has done so by deregulating the airline industry insofar as economic regulation is concerned and by enacting the Wright and Shelby Amendments, which authorize certain types of interstate service, notwithstanding the Bond Ordinance's alleged prohibition against such service. Order 98-12-27 at 39-40.

In that regard the DFW Board's reliance on a 1964 Civil Aeronautics Board decision urging the cities to consolidate their airline service at one airport, DFW Petition at 8-9, is particularly unpersuasive. Congress determined in 1978 to phase out the Board's authority to designate which airport may be used by airlines. As a result, the Board's conclusion is entitled to no weight, since it reflects a type of government intervention that Congress later determined interferes with the best possible development of the airline industry.

The Impact of Additional Love Field Service on DFW's Viability

While an airport owner's proprietary rights would not allow it to restrict service at one airport in order to protect a second airport's revenues, Order 98-12-27 at

30, 34, a state or local government that owns two or more airports arguably may be able to restrict service at one airport in order to avoid closing a second airport. However, the factual information cited to us showed that allowing airlines to operate the services authorized by the Shelby Amendment would not threaten DFW's viability. Order 98-12-27 at 37-38.

The DFW Board now asks us to reexamine our conclusion on the basis of testimony from the state court hearing transcript. While its reconsideration petition, unlike its earlier pleadings, cites specific transcript statements to support of its claims, DFW Petition at 10-15, we find that the cited testimony does not justify any modification in our earlier findings.

First, neither the DFW Board nor Fort Worth attempts to show that earlier judicial or agency decisions would allow an airport owner to restrict service at one airport in order to protect a second airport's revenues.

Secondly, the DFW Board's evidence focuses on how DFW would be affected if airlines like Continental Express could use regional jets for longhaul service from Love Field. The DFW Board claims that other airlines would match Continental Express' proposed nonstop Love Field-Cleveland flights by operating longhaul regional jet service to their own hubs. The resulting diversion of traffic and flights from DFW would allegedly weaken DFW and its hub operations.

This claim is based on a misconstruction of the Wright Amendment. The DFW Board assumes that only the enactment of the Shelby Amendment made longhaul regional jet service lawful at Love Field. The contrary is the case – the Wright Amendment imposed no equipment type restrictions or geographical limits on services operated under the commuter aircraft exemption, as we explained in our final decision. Order 98-12-27 at 47-49. Thus the Wright Amendment, not the Shelby Amendment, authorized longhaul regional jet service.

The DFW Board has failed in any event to show that longhaul regional jet service at Love Field would justify restrictions by Dallas on Love Field service. The DFW Board does not claim that regional jet services or the services authorized by the Shelby Amendment will threaten DFW's viability. The DFW Board instead makes more modest claims: "allowing unfettered operations at Love Field under the Shelby Amendment would contribute to the degradation of DFW's role as the Dallas/Fort Worth area's dominant airport and threaten to fragment the hub operation at DFW," DFW's growth would be "sharply

reduced” by new Love Field service, and “the DFW hub would be sharply reduced in size and scope.” DFW Petition at 10.

The DFW Board’s predictions, even if correct, would not allow Dallas to bar airlines from operating services authorized by the Shelby Amendment. The DFW Board essentially claims that it must be protected from competition at a second airport, whether or not additional services at the second airport would benefit the public. That position is contrary to the public interest and Congress’ policy that competitive market forces should determine the routes served by individual airlines.

The DFW Board’s fears arise from the likelihood that a significant number of travellers would prefer to use Love Field rather than DFW and that airlines will add Love Field flights to meet that demand. That result would be consistent with Congress’ determination that additional Love Field services should be authorized, since they would benefit many travellers. Some travellers have already benefited. Southwest has stated that its introduction of services authorized by the Shelby Amendment -- through service from Love Field to Jackson, Mississippi, and Birmingham, Alabama -- has caused a sharp decline in the fares in those markets. Order 98-12-27 at 13. We would be very reluctant to allow the proprietor of one airport to prohibit services at another airport that benefit the public.

We find even less persuasive the DFW Board’s contention that Love Field service must be restricted to preserve hub operations at DFW. DFW Petition at 13, 14. American uses DFW as its major domestic hub. While hub operations provide significant benefits for many travellers, restricting other services in order to protect hub services due to their benefits is hardly consistent with Congress’ decision that the market, not government agencies (whether federal, state, or local), should determine the nature and level of airline services offered the public. Neither we nor the DFW Board may properly restrict one kind of service (here, point-to-point service at a local airport) in order to protect a different kind of service.

Moreover, we find implausible the DFW Board’s claim that the modest amount of additional service authorized by the Shelby Amendment would significantly damage DFW or American’s hub operations. After all, the Wright and Shelby Amendments impose substantial restrictions on longhaul Love Field service. DFW is the nation’s second largest airport. Legend Reply at 5. And, as explained in our final order, DFW grew rapidly while Southwest was increasing its operations at Love Field within the limits of the Wright Amendment. DFW’s

passenger enplanements increased from 11.3 million in 1979 to 60.5 million in 1997. Finally, Love Field has a relatively small number of gates available for new service. Order 98-12-27 at 37-38. The DFW Board's petition addresses none of these facts.

Indeed, the DFW Board cites evidence that unrestricted regional jet service at Love Field could reduce the number of flights at DFW by 109 per day. DFW Petition at 14. But in 1997 the airlines using DFW operated 2,800 flights per day. Order 98-12-27 at 38. Reducing the number of flights per day by less than four percent would not substantially reduce DFW operations.

In addition, as we noted in our final order, other metropolitan areas (Chicago, for example) receive airline service at two or more airports yet still have a dominant airport comparable to DFW. Order 98-12-27 at 38, n. 18. Continental thus operates a hub at Bush Intercontinental Airport at Houston, which has a second airport, Hobby, which is closer than Bush Intercontinental to downtown Houston. Hobby, unlike Love Field, has no restrictions on airline flights. The DFW Board nonetheless claims that the weakening of American's hub at DFW will cause travellers to shift to Continental's hub at Bush Intercontinental. DFW Petition at 14. Continental's ability to operate a successful hub at Bush Intercontinental despite Hobby demonstrates that allowing additional service at Love Field will not unravel American's hub at DFW.

ISSUE FOUR: ENFORCEABILITY OF DFW USE AGREEMENT RESTRICTIONS BARRING LOVE FIELD SERVICE

The only other issue addressed on the merits by the DFW Board's reconsideration petition is our conclusion that the DFW Board could not enforce its airline use agreements insofar as those agreements arguably bar those airlines from using any other airport in the metropolitan area for interstate service without the DFW Board's approval.

The use agreement's restriction on the use of alternative airports implements the 1968 Bond Ordinance requiring the phase out of interstate flights at airports other than DFW.⁷ Our final order explained that the preemption statute, 49

⁷ Although the DFW Board assumed that its use agreements barred signatory airlines from using competing airports in the Dallas-Fort Worth area, we found that those agreements by their terms do not appear to prohibit any airline from conducting interstate operations at other airports in the Dallas-Fort Worth area. The agreements refer to the Bond Ordinance, but that agreement required the phase-out of interstate service at other area airports only to the extent

U.S.C. 41713, prohibited the DFW Board, like Dallas, from restricting an airline's use of a competing airport. That statute governs airports operated by state and local governments. Such airports may not regulate airline operations by ordinance or, as here, by contract. Order 98-12-27 at 52, citing South-Central Development, Inc. v. Wunnicke, 467 U.S. 82, 97 (1984).

The DFW Board briefly asserts that the enforceability of the use agreement clause does not depend on the validity of the Bond Ordinance, since the clause is a contractual term rather than an incorporation of the cities' agreement. DFW Board Petition at 9-10, citing DFW Board Reply Comments at 21-25. This objection to our decision misses the point. The DFW Board may not enforce the use agreement clause because doing so would constitute the kind of route regulation by a local government proscribed by 49 U.S.C. 41713.

RECONSIDERATION FILINGS

The parties have had ample opportunity to present their factual and legal arguments to us in this proceeding. We have thoroughly considered all of their arguments. Moreover, as noted above, any delay in a final resolution of the federal law issues seems likely to harm the public by creating a risk that airlines will delay or abandon plans to begin operating the services authorized by the Shelby Amendment. We therefore will prohibit the filing of further petitions for reconsideration or other action in this docket until the completion of judicial review.

ACCORDINGLY:

1. The Department of Transportation grants the petitions for reconsideration of Orders 98-12-27 and 98-12-28 filed by Fort Worth and the Dallas-Fort Worth International Airport Board;
2. The Department of Transportation denies the various requests by Fort Worth and the Dallas-Fort Worth International Airport Board that it modify the findings and conclusions set forth in Order 98-12-27 and reaffirms the findings and conclusions made in that order;
3. We accept the additional reply of Legend Airlines;

"legally permissible." Order 98-12-27 at 52. The DFW Board does not challenge that finding. For purposes of this order, we will nonetheless assume that the DFW Board's reading is correct.

4. Except to the extent granted, all other petitions, applications, motions, and other requests are denied; and
5. No further petitions for reconsideration or other pleadings will be accepted in this docket pending judicial review.

By:

A. BRADLEY MIMS

Acting Assistant Secretary for Aviation
And International Affairs

(SEAL)

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